

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

\*\*\* FILED \*\*\*  
12/10/2001

12/05/2001

CLERK OF THE COURT  
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

LC 2001-000330

Docket Code 512

FILED: \_\_\_\_\_

STATE OF ARIZONA

ROGER KEVIN HAYS

v.

STEVE M SIMCIC

SYLVINA D COTTO

MESA CITY COURT  
REMAND DESK CR-CCC

MINUTE ENTRY

MESA CITY COURT

Cit. No. #2000097916

Charge:

1. DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR
2. DRIVING WITH A .10 OR GREATER ALCOOL CONCENTRATION IN BLOOD OR BREATH

DOB: 07/09/70

DOC: 07/28/99

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A). This case has been under advisement and the Court has considered and reviewed the record of the proceedings from the Mesa Municipal Court and the memoranda submitted by counsel.

Mesa police arrested Appellant in July, 1999 for driving under the influence of alcohol and for having a blood alcohol level of .10 or higher and these charges were filed against him in the Mesa Municipal Court. The court granted Appellant's Motion to Suppress and the charges were dismissed. At this time, Appellant was represented by retained counsel.

The State appealed the court's granting of the Motion to Suppress and Appellant failed to respond. On appeal, this Court held for the State and remanded the matter for trial. Appellant claimed indigency and requested court-appointed counsel explaining that he could no longer afford to pay an attorney. The trial court denied his request. Appellant then requested reconsideration, but the trial court did not change its decision. Appellant therefore represented himself at trial.

Appellant alleges the trial court erred because it did not find him indigent and provide him with a court-appointed attorney. As a result, he believes the trial court violated his constitutional right to counsel. Appellant claims that he has no significant assets and little income, and that this financial status was reflected in both his original financial affidavit and the one submitted with his reconsideration request. It is his position that the trial court originally intended to provide him with counsel, but changed its mind because it learned of Appellant's employer-provided stock ownership plan. The trial court later granted Appellant's request for a reduced fee for the trial transcript finding that Appellant could not afford to pay the costs, which Appellant points to as further evidence of the court's previous error.

Under the Sixth Amendment of the Constitution, as incorporated by the Fourteenth Amendment, all defendants in criminal matters are entitled to court-appointed counsel if they cannot afford private attorneys.<sup>1</sup> The Arizona Constitution has a similar provision,<sup>2</sup> as do the Arizona Rules of Criminal Procedure.<sup>3</sup> A court may appoint counsel at any time<sup>4</sup> and at all stages of the proceeding should encourage unrepresented defendants to obtain counsel.<sup>5</sup>

The Rules of Criminal Procedure define an indigent as "a person who is not financially able to employ counsel."<sup>6</sup> The comment to this rule suggests that factors to consider include "income, source of income, property owned, outstanding obligations, number and ages of any dependents, and other sources of family income . . ."<sup>7</sup> Arizona courts applying this rule have looked to similar factors, such as "(1) real or personal property owned; (2) employment benefits; (3) pensions, annuities, social security and unemployment compensation; (4) inheritances; (5) number of dependents; (6) outstanding debts; (7) seriousness of the charge; and (8) any other valuable resources . . .

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<sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 795, 9 L.Ed. 2d 799 (1963).

<sup>2</sup> Ariz. Const. Art. 2, § 24.

<sup>3</sup> ARIZ. R. CRIM. PROC. 6.1(b).

<sup>4</sup> ARIZ. R. CRIM. PROC. 6.1(b) comment.

<sup>5</sup> ARIZ. R. CRIM. PROC. 6.1(e) comment.

<sup>6</sup> ARIZ. R. CRIM. PROC. 6.4(a).

<sup>7</sup> ARIZ. R. CRIM. PROC. 6.4(a) comment.

.<sup>8</sup> The ability of a defendant's friends or family (other than a spouse) to pay for an attorney is irrelevant to a determination of indigency.<sup>9</sup>

Additionally, if a court determines a defendant to be "quasi-indigent"<sup>10</sup> it may provide him with court-appointed counsel and require him to repay a portion of attorney fees.<sup>11</sup> A "quasi-indigent" is a defendant who can contribute toward his defense "such amount as . . . he is able to pay without incurring substantial hardship to himself or to his family."<sup>12</sup> Arizona courts have looked to the United States Supreme Court's description of a defendant who "must borrow money, sell his meager assets, or call upon his family or friends in order to hire a lawyer"<sup>13</sup> as defining the term "quasi-indigent."<sup>14</sup>

Appellant provided three financial statements to the trial court: one with his initial request for a Public Defender, one with his reconsideration request, and one with his request for a reduction of transcript costs. Only the first two are relevant to this appeal. The first financial statement lists income of approximately \$680 to \$750 every two weeks and expenses totaling approximately \$700 per month.<sup>15</sup> The second financial statement states that Appellant's income is \$699 every two weeks and adds previously undisclosed expenses for child support and "miscellaneous debts" to increase the total expenses to approximately \$1200.<sup>16</sup> Appellant also submitted to the trial court a copy of a yearly Employee Stock Ownership Plan statement indicating a former balance of \$1,962.47 as of July 1, 1999, and a current balance, after stock value losses, of \$347.49 as of June 30, 2000.<sup>17</sup> But most importantly, all affidavits prepared by Appellant reflect the fact that he supports three children. Imputing a minimal amount for child support for three children leaves no excess funds with which to hire a lawyer.

As both parties to this matter have agreed, the standard of review is abuse of discretion.<sup>18</sup> In this matter, it is clear that the trial court abused its discretion. The factors that determine indigency do not require a balancing of income and expenses. Instead, they include looking at "income, sources of income, [and] property owned."<sup>19</sup> Both of Appellant's financial statements indicate an annual income of approximately \$18,000 to \$19,000 before taxes. Even if Appellant's income and expenses are balanced his initial financial statement indicates he could, at best, make only nominal contributions toward the cost of a court-appointed attorney as a "quasi-indigent." Using the figures provided in

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<sup>8</sup> *Morger v. Superior Court*, 130 Ariz. 508, 509, 637 P.2d 310 (App. 1981).

<sup>9</sup> *Knapp v. Hardy*, 111 Ariz. 107, 110, 523 P.2d 1308 (1974). *See also* ARIZ. R. CRIM. PROC. 6.4(a) comment.

<sup>10</sup> *Espinoza v. Superior Court*, 166 Ariz. 557, 559, 804 P.2d 90 (1991).

<sup>11</sup> *Id.*; ARIZ. R. CRIM. PROC. 6.7(d).

<sup>12</sup> ARIZ. R. CRIM. PROC. 6.7(d).

<sup>13</sup> 166 Ariz. at 561 (quoting *Fuller v. Oregon*, 417 U.S. 40, 53-54, 94 S.Ct. 2166, 2124-25, 40 L.Ed.2d 642 (1974)).

<sup>14</sup> *Id.*

<sup>15</sup> Appellant's Memorandum at Exhibit C.

<sup>16</sup> *Id.* at Exhibit D.

<sup>17</sup> *Id.* at Exhibit E.

<sup>18</sup> 130 Ariz. at 510.

<sup>19</sup> *See supra* note 7 & accompanying text.

the financial statement supplied for the reconsideration, there is no doubt Appellant is indigent.

Appellant's Employee Stock Ownership Plan must also be factored into the equation. Although this document was approximately seven months out-of-date at the time of Appellant's initial request for a public defender, it is extremely unlikely that during this time the account balance increased sufficiently to provide funds for attorney fees. Even Appellant's prior year portfolio balance of \$1,962.47 does not reach this level. Appellant made little money and had no real assets. He supported three children. He is clearly indigent. The trial court erred in failing to provide Appellant with a court-appointed attorney.

IT IS THEREFORE ORDERED reversing the judgments and sentence of the Mesa City Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Mesa City Court for retrial and for all further and future proceedings.